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DENNIS MONTGOMERY and
the MONTGOMERY FAMILY TRUST

DISTRICT OF NEVADA

VS.

Defendants.

AND RELATED CASES.

**THE MONTGOMERY PARTIES'
OBJECTIONS TO MAGISTRATE
JUDGE'S ORDER RE 30(B)(6)
DEPOSITION OF ETREPPID;
MEMORANDUM OF POINTS AND
AUTHORITIES**

OBJECTION TO MAGISTRATE'S ORDER

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Dennis Montgomery ("Montgomery") and the Montgomery Family Trust (plaintiffs in the base file matter 3:06-CV-00056-PMP-VPC and defendants in the member case 3:06-CV-00145-PMP-VPC) and Brenda Montgomery (defendant in the member case 3:06-CV-00145-PMP-VPC) (collectively, the "Montgomery Parties") do hereby respectfully object to the Magistrate Judge's ruling regarding the 30(b)(6) deposition of eTreppid, issued in minute form on July 17, 2008 (the "July 17 Order") on the ground that it may be read as improperly authorizing a violation of the Protective Order in connection with the preparation of the FRCP 30(b)(6) deposition of eTreppid.

The brief in support of the objection is attached hereto.

Dated: August 4, 2008

Respectfully submitted,

LINER YANKELEVITZ
SUNSHINE & REGENSTREIF LLP

By: _____
Richard J. Mooney

BRIEF IN SUPPORT**I. INTRODUCTION**

On June 27, eTreppid filed a motion seeking to postpone its deposition under FRCP 30(b)(6) on the ground that additional document discovery should occur before commencing the deposition. In particular, eTreppid argued that the Montgomery Parties should be forced to produce computer files containing trade secret source code in advance of the deposition, so that eTreppid could use that source code to prepare the eTreppid representative for the deposition. Such preparation would be an intentional direct violation of the applicable protective order and would severely prejudice the Montgomery Parties. The Magistrate Judge nonetheless granted the postponement, in an order that might be construed as implicitly endorsing eTreppid's planned violation of the protective order. The Montgomery Parties therefore file this Objection to ensure that any such endorsement is explicitly rejected by the Court and eTreppid is made aware that violations of the protective order (and in particular *intentional* ones) will not be tolerated.

II. BACKGROUND

On September 11, 2007, the Court entered the Protective Order to ensure the confidentiality of sensitive information produced in discovery in this matter. *See* Docket No. 264. The Protective Order provides in part that any party may designate as "Restricted Confidential" documents, information, or other material that "the producing party believes in good faith constitute, contain or reflect extremely sensitive and highly confidential proprietary, trade secret or commercial information, for which the designation Confidential will not afford adequate protection under the terms of this Protective Order." *Id.* ¶ 2. The Order further provides that "[d]ocuments or information which has been designated 'Restricted Confidential' shall not be given to the receiving party or the receiving party's employees, representatives, or agents, other than its counsel of record" *Id.* ¶ 5.

On June 6, the Montgomery Parties noticed the deposition of eTreppid on a range of topics relating to the products and services sold by eTreppid and the technology used to provide those products and services. *See* Docket No. 737-2 at 2-6. After the parties encountered difficulty scheduling the deposition, the Court on June 24 directed the parties to meet and confer and select a

1 date during the week of July 21. *See* Docket No. 702 at 3-4. eTreppid's counsel declined to agree
2 to a date during that week, and on June 27 filed a motion seeking a protective order that would
3 delay the deposition. *See* Docket No. 708. The motion argued principally that the deposition
4 should be postponed because the parties were in the middle of producing documents and such
5 production should be concluded prior to the commencement of depositions. *Id.* at 2. The
6 Montgomery Parties opposed the motion, noting among other things that the deposition topics were
7 comprised principally of the very same issues about which eTreppid was prepared to testify in
8 February 2006 at the state court injunction hearing. *See* Docket No. 737 at 1.

9 eTreppid then filed a reply on July 11. *See* Docket No. 751. In the reply, eTreppid argued
10 at length that the Montgomery Parties should be forced to produce the source code in their
11 possession prior to any deposition of eTreppid. *Id.* At 4-5. eTreppid's stated rationale for
12 postponing the deposition until after the production of the source code was that it intended to use
13 the Montgomery Parties' source code in preparing to give testimony at eTreppid's deposition. *Id.*
14 For example, eTreppid argued:

15 Montgomery has also repeatedly contended that eTreppid has not sufficiently
16 identified its "trade secret" source code. In his 30(b)(6) notice, Montgomery states
17 the intent to depose eTreppid regarding "[t]he identification of each trade secret that
18 eTreppid contends was misappropriated" [Cite]. Montgomery will
19 undoubtedly probe this issue in the 30(b)(6) deposition. Montgomery, however, has
20 flatly refused to produce the source code at issue in this case, making it impossible
21 for eTreppid to thoroughly evaluate this issue or to adequately prepare for the
22 30(b)(6) deposition. The deposition should be postponed for this reason alone . . .
23 eTreppid should have the opportunity to fully evaluate the documents, including the
24 source code to be produced by Montgomery, before having to submit to examination
25 on this and related topics. To allow Montgomery to move forward with the
26 deposition before eTreppid has had an opportunity to examine the source code
27 would be highly prejudicial to eTreppid.

28 *Id.*

29 The Magistrate Judge granted eTreppid's motion in minutes dated July 17, 2008, stating in
30 relevant part:

31 The Court finds that the District Court recently affirmed this Court's order regarding
32 source code discovery (#728) and also issued orders denying counter-defendants,
33 Atiego's and Mr. Sandoval's motion to dismiss (#701). As a result, Atiego and Mr.
34 Sandoval must now engage in discovery, and eTreppid is entitled to discovery on
35 the source code. Counsel for the Montgomery parties advises she anticipates a two
36 or three-day deposition of eTreppid's 30(b)(6) witness, but may require additional
37 time, depending on the results of eTreppid's July 28, 2008 document production.

1 Given these circumstances, the Court finds that good cause exists to grant
2 eTreppid's motion for protective order (#708) and Atigeo's and Mr. Sandoval's
3 motion for order preserving rights (#719).

4 Docket No. 760 at 6.

5 **III. ARGUMENT**

6 The Magistrate Judge did not explicitly endorse eTreppid's plan to violate the protective
7 order by using the produced source code to prepare the 30(b)(6) deposition witness (anticipated to
8 be Mr. Trepp himself). However, eTreppid relied in large part on that plan in its reply argument,
9 and the Magistrate Judge specifically mentioned the upcoming source code production as one
10 reason the motion was being granted. Under the circumstances, eTreppid may believe that it has
11 been authorized to ignore the strictures of the Protective Order in connection with the source code
12 and the 30(b)(6) preparation.

13 It is important that such an interpretation be clearly rejected, and eTreppid directed that it
14 not prepare its 30(b)(6) witness with the source code (or any other material produced with a
15 "Restricted Information" designation). The Protective Order was entered last September precisely
16 because of the extreme sensitivity of material to be produced. The source code to be produced is
17 among the very most sensitive of such material – worth millions or tens of millions of dollars and
18 easily copied if not strictly protected. It is in fact the paradigmatic example of material that should
19 and must be guarded as "Restricted Information" under the protective order.¹

20 In addition, Paragraph 9 of the Protective provides a detailed procedure for challenging the
21 designation of any information produced. If eTreppid in good faith believes that portions of the
22 source code should not be treated as "Restricted Information", it can and should avail itself of those
23 procedures. A simple assertion, in advance, that it need not comply with the Protective Order is
24 completely improper.

25
26 ¹ Indeed, even the "Restricted Information" protection currently provided for is likely to be
27 insufficient, and the Montgomery Parties have moved to modify the protective order to provide
28 additional protection for source code. *See* Docket No. 774. Whether or not that motion is granted,
there is no basis for eTreppid to decline to comply with the protective order in place.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Montgomery Parties respectfully request that the
3 Magistrate's Order within the July 17 minutes (Docket No. 760) be overruled to the extent it can be
4 read explicitly or implicitly to authorize any violation of the current (or subsequently modified)
5 Protective Order.

6
7 Dated: August 4, 2008

Respectfully submitted,

8 LINER YANKELEVITZ
9 SUNSHINE & REGENSTREIF LLP

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11 By: _____
Richard J. Mooney

12 Attorneys for DENNIS MONTGOMERY,
13 the MONTGOMERY FAMILY TRUST,
14 and Counterdefendants OPSRING LLC
15 and EDRA BLIXSETH
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am a partner in Liner Yankelevitz Sunshine & Regenstreif LLP, and that on August 4, 2008, I caused to be served the within document described as **THE MONTGOMERY PARTIES' MOTION FOR APPOINTMENT OF SPECIAL MASTER AND/OR MODIFICATION OF THE PROTECTIVE ORDER** on the interested parties in this action as stated below:

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[ELECTRONIC] By filing the document(s) electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document(s) to the persons listed above at their respective email address.

1 I declare under penalty of perjury under the laws of the State of California and
2 the United States of America that the foregoing is true and correct.

3 Executed on August 4, at San Francisco, California.

4 Richard J. Mooney

5 (Type or print name)

(Signature)